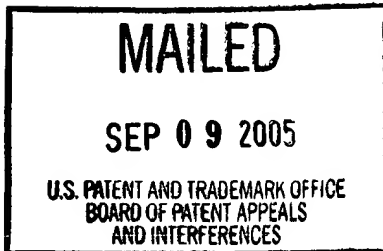


The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**



Ex parte CONRAD O. GARDNER

Appeal No. 2005-1094
Application No. 08/896,514

Before MCQUADE, NASE, and BAHR, Administrative Patent Judges.

BAHR, Administrative Patent Judge.

REMAND TO THE EXAMINER

On August 18, 2005, appellant filed a paper entitled "REQUEST FOR REHEARING" requesting rehearing with respect to the new ground of rejection of claims 55 and 59 entered in the decision of this panel mailed July 21, 2005. In support of this request, appellant has filed a second affidavit of Philip C. Malte¹. It is thus apparent that appellant is not requesting rehearing *upon the same record* as provided in 37 CFR § 41.50(b)(2), but has instead submitted new evidence relating to the claims

¹This affidavit is separate and distinct from the earlier Malte affidavit, referred to as "Malte declaration" in our decision mailed July 21, 2005, a copy of which was submitted with the "SECOND SUPPLEMENTAL BRIEF ON APPEAL" filed February 24, 2003 and with the "SUBSTITUTE SECOND SUPPLEMENTAL BRIEF ON APPEAL" filed December 8, 2003.

subject to the new ground of rejection. Accordingly, we are treating appellant's request as a request to reopen prosecution and have the matter considered by the examiner pursuant to 37 CFR § 41.50(b)(1). Thus, in accordance with 37 CFR § 41.50(b)(1), we remand this application to the examiner for reconsideration of the new ground of rejection of claims 55 and 59 as being unpatentable over Lynch² in view of the admissions on page 7 of appellant's specification.

Pursuant to 37 CFR § 41.50(b)(1), the examiner is required to reconsider the new ground of rejection of claims 55 and 59 weighing all of the evidence of record, including not only the teachings of the applied references and the Malte affidavit filed with the request but also the earlier Malte affidavit³ and appellant's declaration regarding pioneer status, filed May 3, 2004 with the reply brief, and any other evidence of record.

The status of the claims remains as indicated on page 30 of our decision mailed July 21, 2005. As appellant has elected to prosecute further before the examiner pursuant to 37 CFR § 41.50(b)(1), in order to preserve the right to seek review under 35 U.S.C. § 141 or 145 with respect to the rejections affirmed in our decision mailed July 21, 2005, the effective date of the affirmance is deferred until conclusion of the

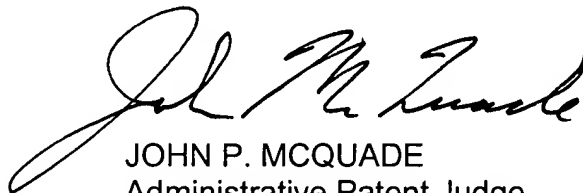
² US Pat. No. 4,165,795, issued August 28, 1979 to Lynch et al.


³ In this regard, we note that all copies of the earlier Malte affidavit in the image file wrapper lack a signature page. In reviewing the evidence of record in this application, the examiner should determine whether the earlier Malte affidavit was in fact ever filed with a signature.


prosecution before the examiner unless, as a mere incident to the limited prosecution, the affirmed rejections are overcome. If the prosecution before the examiner does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejections, including any timely request for rehearing thereof.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

REMANDED


JOHN P. MCQUADE
Administrative Patent Judge


JEFFREY V. NASE
Administrative Patent Judge


JENNIFER D. BAHR
Administrative Patent Judge

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Appeal No. 2005-1094
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